

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption)	NOTICE OF PUBLIC HEARING
of Rules I through IV)	ON PROPOSED ADOPTION
pertaining to the Montana)	
Clean Indoor Air Act)	

TO: All Interested Persons

1. On September 30, 2005, at 1:30 p.m., a public hearing will be held by Metnet Conference at the following Metnet sites: the Metnet studio and auditorium in the basement of the Department of Public Health and Human Services Building, 111 N. Sanders, Helena, Montana; Montana State University at Billings, 214 N. Broadway, 1st Floor Conference Center, Billings, Montana; Montana State University, EPS Building, So. 7th & Grant, Burns Center, Room 126, Bozeman, Montana; Montana Tech, 1300 West Park Street, ELCB, Room 225, Butte, Montana; University of Montana Western Montana College, 710 South Atlantic, STC 2nd Floor, Board Room 201, Great Room 203, 204, Dillon, Montana; Great Falls College of Technology of Montana State University, 2100 16th Avenue S., Room B-133, Great Falls, Montana; Montana State University - Northern, 300 11th Street West, Hagener Science Center, Room 202, Havre, Montana; Flathead Valley Community College, 777 Grandview Drive, Learning Resource Cntr., Room 120, Kalispell, Montana; Miles Community College, 2715 Dickenson Street, Room 106, Miles City, Montana; and University of Montana, Corner of Arthur and Eddy, Gallagher Building, Room 104, Missoula, Montana to consider the proposed adoption of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on September 19, 2005, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@mt.gov.

2. The rules as proposed to be adopted provide as follows:

RULE I DEFINITIONS In addition to those terms defined in 50-40-103, MCA, the following terms, as used in Title 50, chapter 40, part 1, MCA, have the meaning set forth below:

(1) "Enclosed room", for purposes of the definition of "place of work" in 50-40-103, MCA, means an area with a wall on all sides, and does not include an area completely or partially open to the outside air such as a roofed shelter.

(2) "Private residence" means the personal living quarters

of an individual, regardless of the legal status of the property.

AUTH: Sec. 50-40-110, MCA

IMP: Sec. 50-40-103 and 50-40-104, MCA

RULE II BARS, CERTIFICATION OF QUALIFICATION FOR EXCEPTION

(1) An establishment, as defined in 50-40-103, MCA, may apply to the department for a certificate indicating that the department has determined that it is a bar qualifying for the exception from the provisions of Title 50, chapter 40, part 1, MCA, as provided in 50-40-104(5), MCA.

(2) An application for certification may be obtained from the Department of Public Health and Human Services, Montana Tobacco Use Prevention Section, P. O. Box 202951, Helena, MT 59620-2951.

(3) A completed application must be submitted to the department at the address cited in (2). The signature and documentation required by the application will be verified by the department or its designee.

(4) If the department or its designee determines that the establishment does not qualify for the exception allowed by 50-40-104(5), MCA, written notice of that decision and the factual basis for the decision will be sent to the individual who submitted the application.

(5) A copy of each certificate that is granted, and of each decision to deny a certificate, will be filed by the department with the local board of health of the county in which the establishment is located.

AUTH: Sec. 50-40-110, MCA

IMP: Sec. 50-40-104 and 50-40-108, MCA

RULE III INSPECTIONS AND ENFORCEMENT (1) The department, a local health board and their respective designees may conduct inspections of:

(a) enclosed public places to determine if any violation of the Montana Clean Indoor Air Act, Title 50, chapter 40, parts 1 and 2, MCA has occurred; and

(b) public school property to determine compliance with 20-1-220, MCA, relating to smoking on public school property.

(2) For every inspection conducted, a written inspection report must be made and retained by the agency conducting the inspection.

(3) An establishment that serves food but purports to qualify as a bar within the definition contained in 50-40-103(5), MCA must upon request submit to the department, a local health board, or the designee of either, the documentation necessary to prove that at least 60% of the establishment's annual gross income comes from the sale of alcoholic beverages, gambling receipts, or both.

(4) Any violation of the Montana Clean Indoor Air Act or of 20-1-220, MCA must be reported to the local health board or its designee and the county attorney of the county in which the violation occurred.

AUTH: Sec. 50-40-110, MCA
IMP: Sec. 20-1-220, 50-40-104 and 50-40-108, MCA

RULE IV COMPLAINT PROCEDURE REGARDING SMOKING VIOLATIONS

(1) An individual who believes that a violation of the Montana Clean Indoor Air Act or of 20-1-220, MCA has occurred may file a written complaint with the department or the local health board or its designee that describes the violation, provides the date of the violation and is signed by the complaining party.

(2) If a complaint is filed with the local health board, a copy of the complaint must be forwarded within five working days of its receipt to the Department of Public Health and Human Services, Montana Tobacco Use Prevention Section, P. O. Box 202951, Helena, MT 59620-2951.

(3) If a complaint is filed initially with the department or a designee of the department, a copy will be forwarded within five working days to the local health board of the county in which the violation allegedly occurred.

(4) Once a complaint is filed, the department or a designee of the department, which may include the local health department, will conduct an investigation to determine if a violation occurred.

(5) If the department or its designee, after an investigation, determines that a violation did occur, it will document the violation and file the documentation and the determination of the department or its designee with the office of the county attorney in the county where the violation occurred.

AUTH: Sec. 50-40-110, MCA
IMP: Sec. 20-1-220, 50-40-104 and 50-40-108, MCA

3. 2005 Laws of Montana, Chapter 268 (HB 643), passed by the 2005 Legislature, substantially revised the Montana Clean Indoor Air Act, primarily by mandating that the entire state's enclosed public areas and work places be smoke free, with some very narrow exceptions, including one for bars and casinos that expires at the end of September, 2009. 2005 Laws of Montana, Chapter 268 (HB 643) also expands the existing prohibition against smoking on the grounds and buildings of public schools, allowing tobacco use there only during an educational exercise for the purpose of showing the risks associated with smoking.

While the only penalties attached to violation of the anti-smoking statutes are criminal - misdemeanors - and therefore the province of local county attorneys, the department is charged with otherwise supervising and enforcing the law, as are the local health boards under the department's direction. Section 50-40-110, MCA, requires the department to adopt rules implementing the law, as revised by 2005 Laws of Montana, Chapter 268 (HB 643). Because the law is very specific in its requirements, the need for rules to implement them is limited. However, some are nevertheless necessary. The need for each is set out below.

Rule I, Definitions

The two definitions included in this rule are necessary to settle interpretation issues already raised from several sources who were attempting to understand what the law required under certain specific circumstances. One concern was whether an outdoor but sheltered smoking area on the grounds of an inpatient health care facility whose staff members are required to supervise the smoking patients was subject to prohibitions of the Clean Indoor Air Act. The other was whether a family residence on a farm or ranch that was incorporated was, by virtue of the incorporation, subject to the smoking prohibitions of the Clean Indoor Air Act. Without the two interpretive definitions, confusion about those two issues would be recurring.

Rule II, Bars, Certification of Qualification for Exception

Bars, as defined in 2005 Laws of Montana, Chapter 268 (HB 643), include any establishment with a liquor license and in which at least 60% of the business' annual gross income is from the sale of alcoholic beverages, gambling receipts, or both. The Clean Indoor Air Act, as a result of the amendments, contains a general ban on smoking in enclosed public places, with an exception, until 2009, for bars that, in addition to meeting the 60% requirement referred to above, do not let smoke infiltrate into other areas of the building to which the ban still applies. While nothing in the Clean Indoor Air Act, as amended, requires a bar to get certification from the department that it qualifies for the exception from the ban, there is nevertheless a need for a mechanism to determine whether a given bar qualifies for the exception, both to meet the state's enforcement responsibility and to give bar owners some measure of assurance that they qualify. Therefore, Rule II establishes a nonmandatory procedure for a bar to apply for a certificate noting it qualifies for the exception.

Rule III, Inspections and Enforcement

Because the Clean Indoor Air Act now requires the department and local boards of health, under the department's supervision, to enforce the terms of the act, Rule III is needed to establish a procedural mechanism for conducting investigations to ensure compliance with the act and recording the inspection results, and to ensure that instances of noncompliance, after investigation, are referred to the local county attorney. The latter is necessary because the penalties for violations of the statute are criminal, although misdemeanors, and enforcement of them is the responsibility of the county attorneys rather than the department.

Rule IV, Complaint Procedure Regarding Smoking Violations

Rule IV is needed to establish the process for a member of the public to bring a potential violation of the Clean Indoor Air

Act to the attention of proper enforcement authorities. It also is necessary to ensure that both the department and the affected local health authorities are kept apprised of any potential violation of the act and to require a follow up investigation. In addition, in order to ensure proper enforcement, the rule requires that evidence of a violation must be referred to the county attorney, who has the authority to penalize the violator.

There is no fiscal impact by implementing these rules.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than 5:00 p.m. on October 6, 2005. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@mt.gov. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

Dawn Sliva
Rule Reviewer

Russ Cater for
Director, Public Health and
Human Services

Certified to the Secretary of State August 29, 2005.